

STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN PERRY,
Plaintiff-Appellee,
vs.

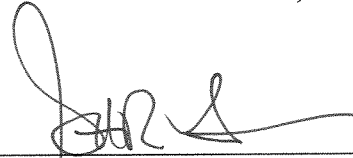
GOLLING CHRYSLER
PLYMOUTH JEEP, INC.
a Michigan Corporation,
Defendant, Appellant,

Supreme Court No. 129943
Court of Appeals No. 25412 I
Lower Court No. 03-053489-NI

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL
BRIEF PURSUANT TO THIS COURT'S MAY 5, 2006 ORDER**

PROOF OF SERVICE

Respectfully Submitted,
BARNETT & TRAVER, P.C.



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FILED

JUN 1 2006

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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STATEMENT OF FACTS

The following facts are taken from Plaintiff-Appellee's Brief opposing Defendant's Application.

On October 19, 2000 Ms. Nichols went to Defendant's dealership to look at and possibly purchase a vehicle. While there, Ms. Nichols was put into a used 2000 Plymouth Neon with no money down. This process included filling out several applications for credit .

One such document which Ms. Nichols purportedly signed, on October 19, 2000, is an Application for Michigan Title-Statement of Vehicle Sale (form RD-108) (**see Exhibit #2, attached to Plaintiff's Brief opposing Defendant's Application**). The Application shows that the Security Interest was recorded eleven days later on October 30, 2000.

The Application also shows that Americredit Financial Services, who financed the vehicle, had a secured interest in the vehicle. Paperwork processed by Defendant, however, indicates that financing was not even approved until October 20, 2000., which suggests that Americredit filed its security interest before it approved Ms. Nichols loan.

Second, a review of the title endorsed for this vehicle shows that the Secretary of State issued the ownership of this vehicle to Ms. Nichols on October 31, 2000, approximately eleven days *after* the accident (**see Exhibit #3, attached to Plaintiff's Brief opposing Defendant's Application**).

Additionally, **Exhibit #3** shows that the filing date for Americredit identified on the title is October 30, 2000, a clear indication that the date identified on the Application for Michigan Title (October 20, 2000) is incorrect.

The back of the Certificate of Title for this vehicle shows that the original title that Defendant retained while awaiting a new title from the Secretary of State was not actually

endorsed by Defendant and transferred over to Ms. Nichols until October 23, 2000, three days after the accident (see pg 2 of **Exhibit #3**).

Ms. Nichols' testimony establishes that Defendant unequivocally could not have complied with the relevant statutes identifying proper transfer of title, and therefore transferred ownership of a vehicle. Specifically, Ms. Nichols, in her deposition testified to the following:

Q Do you understand that there's another document presented to me which is an Application for Michigan Title dated October 19th, did you see that?

A Yes.

Q Is it your testimony that those particular dates are false or inaccurate in that you never did sign it on that date, it was actually the 20th of October?

A Can I explain something?

Q You can explain anything you want. Go ahead.

A I went in on the 19th, it's dated the 19th, but it didn't really go through until the 20th. My approval didn't come through until the 20th.

Q Your approval for your loan is what we are talking about?

A Correct. So on the 20th I went in and signed these papers.

Q So you were at the dealership on October 20thg, the same day of this accident, is that correct?

A Yes

Q What time were you at the dealership?

A I would say between five and 5:30.

(see Exhibit #4, attached to Plaintiff's Brief opposing Defendant's Application)

The following dates, then, are the dates relevant to the issues in this lawsuit:

- October 20, 2000 - paperwork purportedly filled out
- October 20, 2000 - accident occurs
- October 23, 2000 - Defendant endorses title to Ms. Nichols

- October 31, 2000 - Secretary of State issues new title

ARGUMENT

I. Legislative Intent

In previous briefs, Plaintiff has argued that there are affirmative duties placed on a dealership in a vehicle transaction. In this brief, Plaintiff will show why there is a need for such affirmative duties - that is, the legislative intent behind a dealer's statutory requirements.

The primary reasons for a dealership to perform certain affirmative steps is to prevent fraud and to prevent title from being in 'legal limbo'.

The typical situation where these issues arise is in what are commonly referred to as 'yo-yo'/'spot delivery' sales.

In a yo-yo sale, a customer is seemingly approved for financing and in many cases are told that they were approved and they take the car and leave the lot.

Taking a car immediately off of the lot before final approval of financing arrangements, is called spot delivery. Getting called back in because of an alleged financing issue is commonly called a yo-yo sales tactic.

If a customer takes a car off the dealer's lot before financing has actually been approved, the transaction is not actually completed - it's contingent on financing being approved.

Typically, in these situations, the dealer will call the customer sometime after the 'deal', tell the customer that the financing fell through and demand that the customer bring the car back for re-financing - at a higher rate, or for more money down etc. If the customer says no, dealerships may threaten to have the customer arrested for auto theft.

In a case recently decided by the US Supreme Court, *Koons Buick Pontiac GMC v Bradley Nigh*, 543 US 50 (2004) (**Exhibit #1**), the Court looked at the Truth in Lending Act. One

of the *amicus curiae* briefs filed in that case discussed yo-yo sales:

The yo-yo transaction benefits the unscrupulous dealer, defeats the dealer's honest competition (undermining the market system), and causes loss of consumer time, money, and resources. In its most predatory form, as here where the dealer fraudulently concealed the option of simply canceling the transaction by misrepresenting that the trade-in had been sold, the yo-yo sale is merely an updated variation of the classic bait-and-switch scam. The yo-yo sale would rapidly disappear if the dealer risked having to pay the damages enacted by Congress.

In Rucker, the court detailed how deceptive and pernicious a yo-yo sale really is:

A dealer lures a prospective buyer with a financing deal which is unlikely to win approval. The buyer is then allowed to drive away in the car and consider herself the owner for a period of time, only to be called back in when the financing terms are rejected. Back at the dealership, the buyer is persuaded to sign a second deal, backdated to the original date of delivery, with less favorable financing terms. At this point, the buyer is quite likely to sign the deal, even if she may have balked at the terms as an original matter. Psychologically, the buyer has been given a week to become attached to the car, and is less likely to shop around. The buyer is likely unaware of her right to return the car she thinks she has already bought. Indeed, she may not have been told that the original financing fell through, and she may be misled into thinking that the second deal is a better deal. In these circumstances, a buyer will not wish to return the car and face the embarrassment of having to explain to family and friends that she lost the car because she was not creditworthy. Once the backdated contract is signed, there is no evidence on the face of the controlling legal documents that the terms of the deal which the consumer signed actually changed after she took possession of the car.

When a customer drives off of a lot with a vehicle, one type of transaction can occur (a condition precedent contract) where the vehicle is still titled in the dealership's name (a bailment) and the dealer will transfer title after certain conditions (typically financing) have been met.

Another type of transaction (condition subsequent) occurs where the dealer actually signs over title when giving possession to the customer, but retains the ability to cancel the transaction

if certain conditions (again, usually financing) are not met.

A third type of transaction is where a dealer structures yo-yo's to have aspects of both a condition precedent and a condition subsequent contract.

Spot deliveries have long been considered coercive and unconscionable in Michigan (**Exhibit #2**).

II. Application

Ms. Nichols purportedly filled out paperwork late on a Friday afternoon, at about 5:30 pm.

A few hours later, the subject accident occurred.

The following Monday, after learning of the accident, the dealer immediately endorsed the title to Ms. Nichols.

On October 31, 2000, the Secretary of State issued title of the vehicle to Ms. Nichols.

There are three dates associated with financing: October 19, 20 and 30.

The subject transaction is clearly of the type associated with the typical yo-yo sale. The dealer can sit on the paperwork over the weekend, call the customer and say the financing fell through and the parties have to do a new deal.

In short, these type of transactions give the dealer an 'out' in both situations and these transaction are the very type that the statutes are designed to prevent. If the customer will not re-do the deal, the dealer can say the transaction was contingent on financing, so the dealer still owns the vehicle and will have the customer arrested or just repossess the car. Conversely, if something happens (like an accident) then the dealer can claim the customer owns the car.

By not complying with the statutory requirements, dealers have the opportunity to back-date and otherwise manipulate the vehicle documents. Conversely, if the dealer simply mails, delivers or takes other action to get the necessary documents to the secretary of state or transfers

title directly, the opportunity for fraud and legal confusion regarding the sale and title are virtually eliminated.

In this case, the dealer knows it did not comply with the statutory requirements because on learning of the accident, three days after it happened, the dealer immediately signed the title over to Ms. Nichols. There would be absolutely no reason for the dealer to do so if it had previously complied with the statute.

CONCLUSION/RELIEF REQUESTED

The facts of this case demonstrate why merely filling out paperwork does not mean title is transferred and does not mean the customer owns the vehicle.

As shown in Plaintiff's brief opposing Defendant's Application, Michigan law holds that transfer of title requires strict statutory compliance.

Moreover, also as shown in Plaintiff's brief opposing the Application, while Defendant frames the question as 'either/or', Michigan law holds that there may be several owners of a motor vehicle within the meaning of the Michigan Vehicle Code, with no one owner possessing "all the normal incidents of ownership."

Therefore, the question is whether the dealership was at least *an* owner of the car when the accident happened and the unequivocal answer is, 'Yes.'

Therefore, the court of appeals ruling should be affirmed and Defendant's Application should be peremptorily denied, without the need for oral argument.

Dated: May 31, 2006

Respectfully Submitted,

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